FILED
DEC 10 1992
OFFICE OF THE CLERK

No. 92-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF DICO, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 10, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTION PRESENTED

Whether the court of appeals erred in addressing and overruling the interpretation of 28 U.S.C. § 1500 set forth in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which enables claimants against the United States to proceed in two courts simultaneously, where each court has separate jurisdiction to provide a discrete part of the relief which is afforded and available.

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INTEREST OF AMICUS CURIAE

Dico, Inc. ("Dico") respectfully submits this brief as *amicus curiae* in support of petitioner Keene Corporation.[1]

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[1] Petitioner and respondent, the United States, have consented to the filing of this brief *amicus curiae* in support of petitioner. Their letters of consent have been presented to the Clerk under Rule 37.3 of the Rules of this Court.

Dico has a particular interest in the so-called *Casman* interpretation of 28 U.S.C. § 1500, which addresses the circumstance where a claimant against the United States is faced with jurisdictional statutes which provide that part of the relief available must be obtained in a district court and part must be sought in the Claims Court.[2] *Casman v. United States*, 135 Ct. Cl. 647 (1956), and its progeny construe 28 U.S.C. § 1500 to allow these discrete segments of the available relief to be sought concurrently in the pertinent courts, as long as there is no overlap. Although the Federal Circuit in the case below was not presented with the *Casman* fact pattern, it reached out explicitly to overrule *Casman* and the cases which follow it. *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1022 n.3 (Fed. Cir. 1992); Pet. App. A17 n.3.

Since 1986, Dico has been required, under a unilateral order issued by the United States Environmental Protection Agency ("EPA"), to capture and treat a source of groundwater contamination which EPA knows Dico did not create. Dico has petitioned EPA for reimbursement for the costs of the ongoing remedy under 42 U.S.C. § 9606(b)(2), which specifically authorizes such relief. EPA, however, denied Dico's petition, concluding that the statute does not apply to costs stemming from orders issued before the date of the statute's enactment, even if the order is modified and all the cleanup costs are incurred after that date.

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[2] On October 29, 1992, President Bush signed into law the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 ("FCAA"), which provides that the Claims Court is to be renamed the "United States Court of Federal Claims." The FCAA will not become effective until January 1, 1993. *See* FCAA § 1101(a), 106 Stat. 4524. For clarity, Dico will continue to refer to the "Claims Court" throughout this brief. None of the substantive provisions of the FCAA are relevant to the arguments presented here.

The statute provides that if EPA rejects a reimbursement petition under Section 9606(b)(2), the petitioner may "within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement." 42 U.S.C. § 9606(b)(2)(B). Dico timely filed such an action. *Dico, Inc. v. Diamond*, Civil Action No. 4-92-70375 (S.D. Iowa filed June 10, 1992). Dico also claims, however, that if Section 9606(b)(2) is held not to apply because EPA issued its order before that statute's enactment, then EPA's order constitutes both a deprivation of Dico's property without due process of law and a taking under the Fifth Amendment to the United States Constitution.

However, Dico's action against EPA for reimbursement can be brought only in district court. 42 U.S.C. § 9606(b)(2)(B). Dico's takings and due process damages claims exceed $10,000 in amount, and thus can be brought only in the Claims Court. *See* 28 U.S.C. § 1491(a). Relying on the construction of 28 U.S.C. § 1500 set forth in *Casman*, *see, e.g.*, *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988), and seeking to insure that it did not sleep on its claims and could invoke the doctrine of equitable tolling if necessary, Dico brought suit in the Claims Court soon after it had filed its action in the district court. *Dico, Inc. v. United States*, No. 92-453 L (Cl. Ct. filed July 2, 1992). In light of the Federal Circuit's interpretation of Section 1500 in the case below, the United States filed a motion to dismiss that suit.[3]

Dico's predicament illustrates one of the many situations in which claimants against the United States necessarily must proceed in two courts to obtain relief, but will now be turned away from one if the Federal Circuit's reinterpretation of 28 U.S.C. § 1500 stands. Sec-

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[3] That motion remains pending before the Claims Court.

tion 1500 need not—and should not—create such a litigation trap for claimants who must look for relief to segmented statutory jurisdictional routes enacted by Congress.

SUMMARY OF ARGUMENT

Section 1500, properly construed, provides that claimants against the United States may litigate simultaneously in the Claims Court and another court, where each court's jurisdiction extends to a separate part of the remedies to which the claimant is entitled. That construction of Section 1500, which has been set forth in decisions such as *Casman v. United States*, 135 Ct. Cl. 647 (1956), is sound and should remain good law.

In construing Section 1500 to prevent that otherwise reasonable and sensible result, the Federal Circuit misconstrued the terms of Section 1500, ignored the statute's limited purpose, and swept aside pertinent, long-settled precedents. Moreover, the court of appeals reached out to overrule *Casman* despite the fact that there was no need to do so. This Court should correct the court of appeals' unwarranted reinterpretation of Section 1500. In *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), this Court ruled that Section 1500 should not be extended beyond its terms; that is what the Federal Circuit has done in the instant case.

Finally, if the Federal Circuit's construction of Section 1500 is to stand, it must be subject to a mitigating gloss to accommodate segmented jurisdictional avenues for relief. If 28 U.S.C. § 1500 is interpreted to bar access to the Claims Court for the period of time litigation is pending in federal district court, the doctrine of equitable tolling should apply to the portion of the relief which must be sought in the Claims Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ADDRESSING AND OVERTURNING THE CONSTRUCTION OF SECTION 1500 SET FORTH IN *CASMAN v. UNITED STATES*

The Federal Circuit here unnecessarily reached out to overturn the sound construction of Section 1500 set forth in a series of cases beginning with *Casman v. United States*, 135 Ct. Cl. 647 (1956), namely, that Section 1500 does not divest the Claims Court of jurisdiction where a party requesting money damages in that court simultaneously seeks equitable relief in a parallel proceeding. *See, e.g., Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988).[4] That overturning of established precedent is particularly unwarranted where, as here, the so-called *Casman* rule was not at issue. As this Court has warned, a court

> "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

Webster v. Reproductive Health Servs., 492 U.S. 490, 507 (1989) (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)); *see United Pub. Work-*

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[4] Prior decisions of this Court addressing the different jurisdictional powers of the district courts and the Claims Court include: *Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988) (district court jurisdiction proper over suit by state seeking reimbursement under Medicaid provisions; claim was not one for "money damages"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 556-57 (1962) (opinion of Harlan, J.) (discussing the Tucker Act, 28 U.S.C. § 1491, and observing that "[f]rom the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief"); *see also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370-71 (1985) (reimbursement of educational costs under Education of the Handicapped Act, 20 U.S.C. §§ 1401, *et seq.*, not "damages").

ers v. Mitchell, 330 U.S. 75, 89-91 (1947); *United States v. Appalachian Power Co.*, 311 U.S. 377, 423 (1940); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 75 (1831).

In *Casman*, a discharged government employee sued in the Court of Claims for back pay and also filed suit in the district court for reinstatement. At that time, the Court of Claims could not grant reinstatement or similar equitable relief, and the district courts could not award back pay. The Court of Claims held that because "[t]he claim in this case and the relief sought in the district court are entirely different," Section 1500 would not bar the simultaneous litigation. *Casman v. United States*, 135 Ct. Cl. 647, 649-50 (1956). As the court explained:

> Since plaintiff has no right to elect between two courts, section 1500 . . . is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you want your job back you must forget your back pay"; conversely, "If you want your back pay, you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.

Casman, 135 Ct. Cl. at 650; *see Boston Five Cents Sav. Bank*, 864 F.2d at 139 (applying *Casman* rule to separate suit for declaratory relief).

In this case, by contrast, claimants in the consolidated actions before the court, although alleging different legal claims, each sought exclusively monetary relief. *See, e.g.*, Pet. App. A2-A5, F1-F11, H1-H19. Consequently, the actions in the instant case did not implicate *Casman*.[5]

[5] As a purported justification for reconsidering *Casman*, the court of appeals noted petitioner's demand in the Claims Court for "relief different from its indemnification suit" in district court. *See* Pet. App. A22. Petitioner had argued that under *Casman* it should have been able to pursue a Fifth Amendment takings claim in the Claims Court once the district court had dismissed that claim for lack of jurisdiction. *See* Pet. 16 n.6. In fact, petitioner's argument relies not on *Casman*, but on another precedent construing Section 1500, *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966) (Section 1500 did not bar resumption in Court of Claims of claim dismissed by district court for lack of jurisdiction).

II. THE *CASMAN* RULE IS CONSISTENT WITH THE LANGUAGE, CONTEXT, AND PURPOSES OF SECTION 1500

Despite the court of appeals' assertions, the "plain language" of Section 1500 did not call for the court's sudden and dramatic departure from established precedent. *See, e.g.*, Pet. App. A17-A19. The Federal Circuit previously had acknowledged that "[t]he word 'claim' has no one meaning in the law." *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). And Congress's equating the word "claim" with "cause of action" in Section 1500 merely compounds the evident ambiguity. *See Johns-Manville*, 855 F.2d at 1560; *United Mine Workers v. Gibbs*, 383 U.S. 715, 722, 724 (1966) ("the meaning of 'cause of action' was a subject of serious dispute" when Federal Rules of Civil Procedure were adopted and remains "the source of considerable confusion"). In such circumstances, the appropriate construction of Section 1500 demands attention to the statute's context as well as its legislative background and to established precedents that have resulted from applying the statute's terms to concrete facts.

Commentators have pointed out that the "underlying reason" for Congress's enactment of Section 1500

> was the limited application of the rule of res judicata in suits against Government and against government officers. Without the section, as Senator Edmunds pointed out, the claimants could retry the issues in a second suit against the United States. This was possible because the judgment in the first suit against the government officer-agent would not be res judicata in the second suit against the United States. Accordingly, the election required by the statute has been

> understood as designed only to provide a substitute for the absent rule of res judicata in successive suits against a government officer and against the Government.

D. Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 578 (1967) (footnote omitted).

This Court has long adhered to that interpretation of Section 1500. *See Matson Navigation Co. v. United States*, 284 U.S. 352 (1932). When this Court decided *Matson*, Section 154 of the Judicial Code, ch. 231, 36 Stat. 1138 (1911), the predecessor to Section 1500, divested the Court of Claims of jurisdiction only where the district court suit was against a person acting under the authority of the United States. *See Matson*, 284 U.S. at 355. The Court of Claims, however, had applied Section 154 to bar simultaneous suits against the United States itself, reasoning that Section 154's purpose was "to prevent the Government from being sued in separate jurisdictions on the same cause of action and to make the plaintiff elect in which court to sue." *Matson Navigation Co. v. United States*, 72 Ct. Cl. 210, 213 (1931).

This Court rejected the Court of Claims' interpretation of Section 154. The Court held that the purpose of Section 154 "was only to require an election between a suit in the Court of Claims and one brought in another court . . . *in which the judgment would not be* res adjudicata *in the suit pending in the Court of Claims.*" *Matson*, 284 U.S. at 355-56 (emphasis added).

This Court's rationale in *Matson* accounts for the Court of Claims' decision in *Casman*. Quoting *Matson*, the Court of Claims stated that Section 1500 was intended only to " 'require an election between a suit in the Court of Claims and one brought in another court.' " *Casman*, 135 Ct. Cl. at 649 (quoting *Matson*, 284 U.S. at 356). In the circumstances before it, however, the Court of Claims reasoned that "the plaintiff obviously

had no right to elect between the courts," because "[t]he claim in this case and the relief sought in the district court are entirely different." *Casman*, 135 Ct. Cl. at 649-50. The court acknowledged a 1948 amendment to Section 1500,[6] but noted that "the changes have no effect on the overall purpose of the section." *Casman*, 135 Ct. Cl. at 649 n.1. Following *Matson*'s directive against extending Section 1500 beyond its terms, the *Casman* court concluded that the plaintiff "does not have pending in any other court a suit 'for or in respect to' his claim for back pay." *Casman*, 135 Ct. Cl. at 650.

Casman thus reflects allegiance both to Congress' expressed purpose behind Section 1500, as reflected in the statutory text, and to this Court's precedents construing that statute. It is not properly labeled one of Section 1500's "judicially created exceptions and rationalizations," as the Federal Circuit did in the decision below. Pet. App. A14. That label implies a departure from language and purpose, which is not the case.

The *Casman* rule is also consistent with sound principles of judicial administration. Section 1500 is in derogation of the rule prevailing in other contexts that "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." *Donovan v. City of Dallas*, 377 U.S. 408,

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[6] After *Matson* had been the law for fifteen years, the Judicial Code was revised and reenacted. Although claiming to have made only "changes in phraseology," the revisers added language to include parallel suits or process "against the United States." *See* 28 U.S.C. § 1500 and the accompanying Reviser's Notes; *see also* Schwartz, *supra*, at 574, 578 ("the revisers recorded no intent to change substance"). A bare, unexplained change in language, however, cannot create an entirely new congressional policy. The *Matson* decision remains a sound evaluation of Section 1500's genesis and purpose, even if that statute's later "change in phraseology" may have nullified *Matson's* practical effect.

413 (1964) (quoting *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1848)). In exercising simultaneous jurisdiction, as this Court has recognized, federal courts should "avoid duplicative litigation," but are constrained by "no precise rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Suits may proceed concurrently, and "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems." *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 183 (1952).

In contrast to the Federal Circuit's reinterpretation, *Casman*'s construction of Section 1500 is particularly appropriate given the historical context of the terms of the statute. At the time Congress enacted the predecessor to Section 1500, injunctive or declaratory relief would not have been available in district court if the suit were in reality one against the United States. *See generally Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).[7] Under the 1976 amendment to the Administrative Procedure Act, however, a plaintiff's claim for relief "other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. Applying Section 1500 to include a parallel suit for injunctive or declaratory relief would therefore extend the statute's reach to claims which Congress could not have intended to bar.[8]

[7] A suit might be brought against an agent or officer of the United States, but only where the judgment obtained would not be *res judicata* against the United States. *See United States v. Lee*, 106 U.S. 196, 222 (1882) (allowing suit to try title but noting lack of *res judicata* effect).

[8] Forcing litigants to delay either their equitable remedies or their money damages would be contrary to Congress' purpose in enacting the 1976 APA amendment. The legislative record of that amendment notes that equitable relief will be available in addition to damage remedies, except where the statute creating damage remedies "expressly or impliedly forbids" other forms of relief. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976).

The same logic would apply to suits for restitution or reimbursement obtainable only in district court and not in the Claims Court.

The *Casman* rule thus properly accommodates the availability of equitable remedies outside the Claims Court. The Claims Court is free to stay its proceedings while the equitable proceedings are pending in the other court. The burdens imposed on the United States by a stayed lawsuit are manageable. Moreover, the ability to sue the United States in courts other than the Claims Court means that such a separate suit can have a *res judicata* effect on the Claims Court litigation. *See, e.g., Duncan v. United States*, 667 F.2d 36, 38, 229 Ct. Cl. 120 (1981), *cert. denied*, 463 U.S. 1228 (1983); *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4404, at 23 (1981) (noting the "time-honored tradition that a second court is often free to proceed with an action instituted on the same claim as a prior in personam action," and that an earlier judgment will be given *res judicata* effect).

Significantly, only four years ago, the Federal Circuit had reaffirmed *Casman*'s importance to an accurate and appropriate construction of Section 1500's jurisdictional scheme. In *Johns-Manville*, *supra*, the Federal Circuit established a new standard for applying Section 1500's directive that the Claims Court shall not exercise jurisdiction over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The court of appeals held that the "for or in respect to which" language was "to be defined by the operative facts alleged, not the legal theories raised" in the suit outside the Claims Court. *Johns-Manville*, 855 F.2d at 1563. The *Johns-Manville* court based this broad, "operative facts" test on the *Casman* rule, holding that a

parallel suit's "operative facts" were not the same "where a type of relief not available in the Claims Court is sought in the other court." *Johns-Manville*, 855 F.2d at 1568. Reaffirming *Casman's* conclusion, the Federal Circuit stated that "the legislative history and the cases indicate section 1500 was enacted for the benefit of the government and was intended to force an election *where both forums could grant the same relief*, arising from the same operative facts." *Johns-Manville*, 855 F.2d at 1564 (emphasis added).[9]

The interpretation of Section 1500 established in *Casman* comports with the language, context, and purpose of the statute, is fair to both claimants and the United States, and has stood the test of time. The Federal Circuit's sudden jettisoning of that application of Section 1500 mandates reversal.

III. IF THIS COURT UPHOLDS THE FEDERAL CIRCUIT'S REINTERPRETATION OF SECTION 1500, THE DOCTRINE OF EQUITABLE TOLLING SHOULD APPLY TO CLAIMS OVER WHICH THE CLAIMS COURT IS TEMPORARILY DISABLED FROM EXERCISING JURISDICTION BECAUSE OF THE PENDENCY OF A CASE IN DISTRICT COURT

If permitted to stand, the decision below would arbitrarily impair either the equitable or the money damage claims of parties. As Chief Judge Nies recognized, that untoward result demands that "the option of tolling the statute of limitations should be available to the Claims Court." Pet. App. A25 (Nies, C.J., concurring). This

[9] In the decision below, the Federal Circuit abruptly uncoupled the "operative facts" test from the *Casman* rule, without acknowledging or explaining this modification of *Johns-Manville*. The court of appeals purported to "reaffirm [its] view in *Johns-Manville*," Pet. App. A21, but that assertion does not square with the court's holding. The Federal Circuit has thus newly created an "operative facts" test far more restrictive than that contemplated by the same court in *Johns-Manville*.

Court's own precedents call for such a mitigation of the Federal Circuit's construction of Section 1500.

This Court has extended the "rebuttable presumption of equitable tolling" to "suits against the United States," and noted that equitable tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading." *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457-58 (1990). A party who is turned away at the door of the Claims Court has not "slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965). Indeed, if a party brings in the district court a claim that properly belongs in the Claims Court, the claim can be transferred and will be heard even though the statute of limitations has run before the transfer occurs. *See* 28 U.S.C. § 1631; *Herb v. Pitcairn*, 325 U.S. 77, 78-79 (1945) (action is commenced even where first court cannot proceed to judgment, so long as transfer to proper court is permitted). The rule should be the same where a claim is blocked by Section 1500.

This Court has recognized the applicability of equitable tolling in circumstances analogous to those created by Section 1500, as construed by the Federal Circuit. For example, where exhaustion of administrative remedies is a necessary precursor to bringing suit in court, the statute of limitations is tolled for the period of administrative action. *See Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). Under former practice, where a case was transferred from a court's equity jurisdiction to its law jurisdiction, a plaintiff upon transfer could add legal claims on which the statute of limitations had run. *See Friederichsen v. Renard*, 247 U.S. 207, 210-11 (1918). Finally, equitable tolling was extended to loyal citizens who were prevented by the Civil War from bringing their claims in the district courts located within the Confederacy. *See Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867). Such cases "all rest on the

ground that the [party] has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case." *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 222 (1869). That principle squarely applies here.

CONCLUSION

Litigants against the United States should be given at least a chance to obtain redress for their claims. The *Casman* construction of Section 1500 implements the terms of the statute and takes account of Congress's purpose in enacting it, namely, to forbid simultaneous suits for the same relief where one suit would not be *res judicata* for the other. The Federal Circuit's sweeping reinterpretation of Section 1500 therefore is unwarranted.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 10, 1992